Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CATALINO ROSARIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the District court committed plain error by sentencing Petitioner in accordance with the enhanced sentencing provisions of 21 U.S.C. § 841(b)(1)(A), where petitioner was indicted under 21 U.S.C. § 846 and 21 U.S.C. § 841(a)(1), and where neither of these sections provide for penalties, and where the drug quantity in § 841(b)(1)(A), had not been charged in the indictment and the jury was not required to make any findings with regard to amount of controlled substance beyond a reasonable doubt in light of *Apprendi*?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Catalino Rosario, respectfully prays that a writ of certiorari issue to review the district court's sentencing of Petitioner in accordance with 21 U.S.C. § 841(b)(1)(A), in light of this Court's ruling in *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

OPINION BELOW

The Seventh Circuit's opinion affirming the Petitioner's conviction and sentence is set forth in Appendix "A" hereto at Page A-1.

JURISDICTION

The Seventh Circuit entered judgment affirming the Petitioner's conviction and sentence on December 7, 2000. This petition is timely filed within 90 days of that judgment. This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation."

STATUTORY PROVISIONS INVOLVED

Title 21 United States Code, § 841(a)(1):

> "(a) Unlawful acts
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –
>
> (1) to manufacturer, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance, . . . "

Title 21 United States Code, § 846:

> "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

STATEMENT OF FACTS

1. A two count indictment charged Petitioner with conspiracy to distribute kilogram quantities of cocaine. Specifically count one alleged a violation of 21 U.S.C. § 846 to violate § 841(a)(1). Count two alleged attempted

possession of 46 kilograms of cocaine in violation of 21 U.S.C. § 846.

Rosario went to trial alone, while his codefendants cooperated and testified for the government. The evidence at trial showed that during the period charged in the conspiracy, Rosario and codefendants delivered 37 kilograms of cocaine; that 46 kilograms of cocaine were found in the codefendants' possession in Missouri and Chicago; and 17 kilograms of cocaine were found in the codefendant's possession in California. The codefendants testified that Rosario directed their criminal conduct.

The jury instructions did not require the jury to determine the amount of cocaine involved in the conspiracy, or as part of the uncharged conduct. Nor was the jury asked to resolve whether Rosario acted as a leader or an organizer of criminal activity involving five or more participants. See U.S.S.G., § 3B1.1(a). The jury returned general verdicts on both counts.

At the sentencing hearing, Rosario objected to proposed sentencing guideline enhancements. Those objections were overruled. After making factual findings to support enhancements for uncharged drug amounts and for role in the offense, the district court sentenced Rosario to 372 months imprisonment.

On appeal the conviction was affirmed. Rosario did not challenge the sentencing enhancements on direct appeal because the Seventh Circuit law prior to *Apprendi* rejected such arguments on the basis that drug amounts

and roles in the offense were clearly sentencing factors. See *United States v. White*, 888 F.2d 490, 499 (7th Cir. 1989).

REASONS FOR GRANTING THE WRIT

Petitioner Catalino Rosario has been ordered to spend 372 months in a federal prison. The jury's verdict did not mandate nor support this result, for the jury did not make any express findings (based on proof beyond a reasonable doubt) regarding the amount of drugs involved in the offense. Rather, Rosario's draconian sentence is based on a judge's factual findings made under the preponderance of the evidence standard subscribed to by the Seventh Circuit. *United States v. White*, 888 F.2d 490, 499 (7th Cir. 1989).

The sentencing court employed the enhanced sentencing provisions of 21 U.S.C. § 841(b)(1)(A) without notice or reference in the indictment or jury verdict as to propriety of such enhanced sentencing provision. Before the sentencing court could exceed the statutory maximum penalty of 20 years imprisonment prescribed under 21 U.S.C. § 841(b)(1)(c), the government was required to allege the 21 U.S.C. § 841(b)(1)(A) element in the indictment and prove it beyond a reasonable doubt to the jury. Therefore, the sentence of 372 months imprisonment exceeded the statutory maximum by 132 months.

Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) was decided after oral arguments in this case, but before the expiration of time for filing a petition for certiorari.

In *Apprendi*, this Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

The 372 months sentence imposed on Rosario exceeded the prescribed statutory maximum of 20 years for the type of drug involved without a showing as to quantity. Imposition of the 372 month sentence on that basis of a drug quantity determination made by the district court was error under this Court's decision in *Apprendi*. Accordingly, the Seventh Circuit's affirmance of Rosario's sentence should be vacated, and the case should be remanded to the court of appeals for further consideration in light of *Apprendi*.

Petitioner Rosario did not raise his constitutional claim in the court of appeals below, and his claim may therefore be considered only under a plain-error standard. Fed. Rules Crim. Proc. 52(b); *Johnson v. United States*, 520 U.S. 461 (1997); *United States v. Nordby*, 225 F.3d 1053, 2000 WL 1277211 at *6 (9th Cir. Sept. 11, 2000); *United States v. Meshack*, 225 F.3d 556, 2000 WL 1218437, at *12 (5th Cir. Aug. 28, 2000). To secure reversal under this standard petitioner must prove that 1.) There was error; 2.) the error was plain; 3.) that the error affected "substantial rights." See *United v. Olano*, 507 U.S. 725, 732 (1993). If the conditions are met, the court may exercise its discretion to notice the forfeited error only if the error, 4.) "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.*

The Court should recognize the *Apprendi* error described above in this petitioner's case. That the error

did not become apparent until appeal does not bar relief. It is enough that the *Apprendi* error is "plain" at the time of this appeal. *Johnson v. United States*, 520 U.S. 461, 468 (1997).

Turning next to the question, whether the district court's failure to submit the question of drug quantity to the jury affected petitioner's "substantial rights." *Olano*, 507 U.S. at 732. To answer this question, the Court simply weighs the extra sentence imposed upon petitioner beyond that permitted by the jury's verdict. The jury convicted petitioner of violating 21 U.S.C. § 846 Conspiracy to violate 21 U.S.C. § 841(a)(1) with no specification of the amount of controlled substance involved. The jury's verdict supported the penalty prescribed under 21 U.S.C. § 841(b)(1)(c) of not more than twenty (20) years, but the court sentenced Rosario to 372 months imprisonment, wholly 132 months in excess of statutory maximum. Such sentence easily affected petitioner's "substantial rights." *United States v. Anderson*, 201 F.3d 1145, 1152 (9th Cir. 2000) ("a longer sentence undoubtedly affects substantial rights.")

Under the fourth prong of the "plain error" standard, the court must conclude that the *Apprendi* error in this petitioner's case "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S at 732. The rights to jury trial and a determination of guilt beyond a reasonable doubt are the bedrock of our constitutional system of justice. *Apprendi*, 120 S.Ct. 2355-56. Moreover, fairness is undermined when a court's error "imposes a longer sentence than might have been imposed had the court not plainly erred", *United States v. Castillo-Casiano*, 198 F.3d 787, 792 (9th Cir. 1999), amended

by 204 F.3d 1257 (9th Cir. 2000). This court, therefore, should exercise its discretion to take account of the plain error.

Since the facts upon which Rosario's 372 months sentence has been predicated were not found beyond a reasonable doubt by a jury, Rosario's rights to due process, an indictment, notice, and a jury trial under the Fifth and Sixth Amendments to the United States Constitution have been violated.

Based on the foregoing, we respectfully move this Honorable Court to grant certiorari, vacate the judgment below, and remand for consideration in light of *Apprendi*.

CONCLUSION

Wherefore, Petitioner Catalino Rosario respectfully prays that this court grant his Petition for Writ of Certiorari, and remand this case for further consideration in light of *Apprendi* and/or grant any other appropriate relief.

Respectfully submitted,

ANITA RIVKIN-CAROTHERS
Attorney For Petitioner

In The

United States Court of Appeals

For the Seventh Circuit

No. 99-2733

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CATALINO ROSARIO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division,
No. 94 CR 261 – **James B. Zagel**, *Judge.*

ARGUED MAY 16, 2000 – DECIDED DECEMBER 7, 2000

Before EASTERBROOK, RIPPLE, and ROVNER, *Circuit Judges.*

ROVNER, *Circuit Judge.* Catalino Rosario, Porfirio Rivera, and Frank Vargas were indicted on two counts of conspiracy to distribute cocaine and attempted possession of cocaine with intent to distribute it in violation of 21 U.S.C. § 846. Rosario filed a motion to quash his arrest and suppress a pager found on him during the arrest, which the court denied. Rivera and Vargas pled guilty and testified against Rosario and a jury convicted him on both charges. Rosario now appeals, challenging the

court's denial of his motion to quash the arrest and suppress the evidence.

I.

The trail that ultimately led to Rosario began on April 15, 1994, when the Missouri State Highway Patrol stopped a brown Mazda minivan driven by Frank Vargas that was weaving and moving erratically. The van was registered to Porfirio Rivera, but Vargas was the sole occupant. A subsequent search of the van revealed 46 packages of cocaine in hidden panels in the van, with a total weight of 40.55 kilograms. After his arrest, Vargas agreed to cooperate with the police. He related that the owner of the cocaine was a man named "Pacho," whom he later identified as the defendant, Catalino Rosario. He declared that Pacho had hired him to transport the cocaine from Los Angeles to Chicago, and that Pacho had a total of 100 kilograms of cocaine for shipment to Chicago. Of that total, he had already delivered 37 kilograms to Chicago on an earlier trip, and 17 kilograms remained in Los Angeles awaiting transport. Vargas possessed three different pager numbers for Pacho including a new pager number that he was supposed to use upon arrival in Chicago to contact Pacho. Vargas also told them that he believed "Pacho" was just a nickname, and that Pacho had previously used a name of Rafinio Ray and also had used a first name of Arturo, but he did not know if those were aliases as well. The officers ran a computer check of those names in the DEA computer system, and found the name Rafinio Ray with an alias for the name of Arturo Robles. That provided some corroboration for Vargas' claim that "Pacho" was involved in the drug scheme.

Based upon that information, a decision was made to attempt a controlled delivery in Chicago, at which time the Drug Enforcement Agency became involved in the case. Vargas and the agents checked into the Hampton Inn in Bedford Park, and Vargas paged Pacho. Approximately ten minutes later, Pacho returned the call to Vargas at the hotel. Pacho told Vargas that a person named "Jose" would be calling him. This call was recorded, but only Vargas' voice and not that of the caller was intelligible on the tape. The agents relied on Vargas for the identity of the caller and the content of the conversation.

At approximately 8:00 p.m., a person identifying himself as "Jose" called Vargas and said he would come to the hotel the next morning. That conversation was recorded. "Jose" called again the next morning to inform Vargas that he was en route to the hotel, and he arrived at the hotel around 9:15 a.m. Agents later discovered that the person known as "Jose" was Porfirio Rivera – the same person in whose name the Mazda minivan was registered. After Rivera's arrival, Pacho called Vargas at the hotel. The meeting between Vargas and Rivera and the conversation with Pacho were videotaped and recorded. In the telephone conversation, Pacho stated that he was flying from Los Angeles to Midway Airport on a flight that arrived around 6:00 p.m., and he needed to be picked up there. Vargas translated that conversation for the agents, and explained that Rosario generally flew on America West Airlines. After the telephone conversation, Rivera took the minivan keys and drove away in the minivan, at which time he was arrested.

That evening, the agents accompanied Vargas to the airport and positioned him in an area of the airport where he could view passengers who had disembarked from the planes. An America West plane arrived from Los Angeles at approximately 6:00 p.m., but the agents were unable to single out anyone departing it as "Pacho" based on the rather general description provided by Vargas. Vargas, however, spotted Pacho among the individuals who had been on the plane, and pointed him out to the agents. At that time, Pacho was briefly detained and questioned regarding his identity. He produced identification establishing that he was Catalino Rosario. He was ultimately brought outside, where Vargas again identified him as the person he knew as "Pacho." A subsequent search of Rosario yielded a card with one of the pager numbers that Vargas had possessed on it, and a pager. When a DEA agent dialed another of the numbers found in the minivan at the time Vargas was arrested, the pager Rosario had been carrying activated.

II.

Rosario argues that the police lacked probable cause to arrest him without a warrant, and that the pager and number found on him should be suppressed as the fruits of the unlawful arrest. He asserts that the police relied solely on Vargas' statements implicating Rosario, and that Vargas was an unproven informant whose statements relating to Rosario were not corroborated by other evidence.

Probable cause for an arrest exists when the law enforcement agents could reasonably believe, in light of

the facts and circumstances within their knowledge at the time of the arrest, that the suspect had committed or was committing an offense. *United States v. Kincaid*, 212 F.3d 1025, 1028 (7th Cir. 2000); *United States v. Osborn*, 120 F.3d 59, 62 (7th Cir. 1997). It is a flexible, practical commonsense standard that is met if the facts are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed. *United States v. Colonia*, 870 F.2d 1319, 1323 (7th Cir. 1989) (citations omitted); *United States v. Evans*, 27 F.3d 1219, 1228 (7th Cir. 1994). We review the district court's probable cause determination *de novo*, but accept the district court's findings of historical fact unless they are clearly erroneous and "give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Osborn*, 120 F.3d at 62, *quoting Ornelas v. United States*, 517 U.S. 690, 699 (1996).

The arrest and subsequent search in this case was based upon the information provided by Vargas. Rosario argues that probable cause is not established here because the information was provided by an untested informant and lacked sufficient corroboration. Information from an informant can provide probable cause for an arrest if the information is reliable. *United States v. Scott*, 19 F.3d 1238, 1242 (7th Cir. 1994). For instance, in *Illinois v. Gates*, 462 U.S. 213, 246 (1983), the Court held that a highly detailed tip from an anonymous informant that was corroborated by independent police work was enough to establish probable cause for the search. In the present case, we are not faced with an anonymous informant, but rather an untested informant who is providing information that to some extent is incriminating, but which is provided in

order to reduce his own criminal liability. In analyzing whether such information from an informant is sufficient to establish probable cause, we must consider the information provided by that informant – in amount and in the degree of reliability – and the degree of corroboration of that information by the officers. *United States v. Navarro*, 90 F.3d 1245, 1253 (7th Cir. 1996).

Although Vargas did not have a prior history as an informant that would enhance the reliability of his information, the agents were able to corroborate a great deal of the information provided by him prior to the arrest and search of Rosario. For instance, Vargas claimed that the drugs were owned by Pacho, who also went by the names Rafinio Ray and Arturo. A check on the DEA computer system revealed a match for the name Rafinio Ray with an alias of Arturo Robles. This provided some corroboration of Vargas' claim that the person he identified as Pacho was in the drug business. Vargas further stated that when he arrived in Chicago he was to page a certain number and the owner of the cocaine, Pacho, would call him. That indeed transpired, in that Pacho returned his page. In addition, Vargas told the agents that Pacho had informed him that "Jose" would call regarding the cocaine. Rivera, using the name Jose, in fact called him later and made plans to pick up the cocaine the following morning. Because Vargas had not contacted "Jose" himself, that call could only have been triggered by Pacho after speaking with Vargas. When Jose came to the hotel, they discussed the prior shipment of cocaine that had been delivered, which corroborated Vargas' statement to the agents that he had previously delivered 37 kilograms to Chicago from Los Angeles. Finally,

Vargas informed them that Pacho was arriving at 6:00 p.m. at Midway Airport, probably on America West Airlines. The agents confirmed that an America West flight from Los Angeles was landing in Chicago at that approximate time. Vargas then identified Rosario among the passengers that exited that plane. In short, Vargas' statements relating to the drug conspiracy were corroborated repeatedly when the events transpired as he foretold, and there is no basis in the record for disturbing the district court's fact findings to that effect. As the Supreme Court recognized in *Alabama v. White*, 496 U.S. 325, 329 (1990), when "an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity." *See also Navarro*, 90 F.3d at 1253 (relying on *Gates* and *White*, noting that information can be credited where the tip contains specific details about future actions not easily predicted, thus demonstrating "inside information."). Here, the agents were able to corroborate numerous facts provided by Vargas, and that established a reasonable basis for them to credit his information regarding Rosario and to believe that a crime had been or was being committed. The *Gates* Court recognized that "only a probability, not a prima facie showing, of criminal activity" is required to establish probable cause, 462 U.S. at 235, and that standard is met here.

III.

Rosario raised a number of other arguments in the brief on appeal, but all were either withdrawn at oral argument or are meritless. He argued that the court erred

in refusing to dismiss the indictment based on the use of hearsay in the grand jury. This argument is without merit because an indictment may be based upon hearsay, *Costello v. United States*, 350 U.S. 359, 363 (1956), and Rosario does not argue that this testimony was misrepresented as anything else. Furthermore, even if there were error (which is not the case here), any such error in the presentation of evidence before the grand jury would be harmless given the jury conviction at trial which indicates a proper grand jury proceeding would have still yielded an indictment. *United States v. Fountain*, 840 F.2d 509, 513-14 (7th Cir. 1988); *Tyson v. Trigg*, 50 F.3d 436, 442 (7th Cir. 1995).

The remaining arguments presented by Rosario were withdrawn at oral argument because they require development of facts outside the record and thus are more properly presented in a § 2255 petition. Specifically, Rosario withdrew his arguments regarding the Speedy Trial Act, ineffective assistance of counsel, and the alleged use of perjured testimony by the prosecutor. Regarding the use of perjured testimony, Rosario's attorney purported to withdraw only part of that argument, stating at oral argument that she withdrew that argument only to the extent it alleged that the government knew the witnesses were lying, as opposed to the government having reason to be suspicious. Such a "partial" withdrawal would be problematic indeed, because an adverse determination on direct appeal will have preclusive effect in any subsequent collateral attack. *United States v. Brook*, 125 F.3d 484, 495 (7th Cir. 1997). A claim must be presented in its entirety rather than in a piecemeal fashion, lest the litigant risk the preclusive effect of the prior

ruling. Therefore, it is inconsistent for Rosario to simultaneously assert that he is withdrawing the perjury issue to develop in a § 2255 petition, but is pursuing the perjury issue in part on direct appeal. Fortunately for him, the statement at oral argument was sufficient to withdraw the argument in its entirety and preserve it for § 2255 review where the extra-record facts necessary for the argument can be developed. Although Rosario's attorney sought to proceed with the argument that the government had reason to know the testimony was perjured, no such argument was raised in the brief and thus that argument was never before this court. Although the briefs mentioned the term "should have known" in the heading, the argument itself addresses only the actual knowledge of the government and never makes that alternative argument. Accordingly, when Rosario's attorney withdrew the perjury argument to the extent that it encompassed the actual knowledge of the government, she withdrew the entire perjury argument and preserved it for a potential § 2255 petition.

For the above reasons, with respect to the issues that remain before this court, the decision of the district court is affirmed.

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No. 00-1245

In the Supreme Court of the United States

CATALINO ROSARIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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11PP

QUESTION PRESENTED

Whether the district court committed plain error by sentencing petitioner for conspiracy to distribute cocaine, and attempted possession of cocaine with the intent to distribute it, in accordance with 21 U.S.C. 841(b)(1)(A) (1994 & Supp. IV 1998), in the absence of a jury finding as to the quantity of drugs involved in petitioner's offense.

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In the Supreme Court of the United States

No. 00-1245

CATALINO ROSARIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 234 F.3d 347.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2000. The petition for a writ of certiorari was filed on January 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of conspiring to distribute cocaine, and attempting to possess cocaine with the intent to distribute it, both in violation of 21 U.S.C. 846.

Petitioner was sentenced to concurrent terms of 372 months' imprisonment, to be followed by ten years of supervised release, on each of the two counts of conviction. C.A. App. A79. The court of appeals affirmed. Pet. App. 1-9.

1. Petitioner managed an organization that distributed cocaine in the Chicago area, and he was responsible for the transportation of large quantities of cocaine from California to Illinois. He was arrested following the arrest and cooperation of one of his workers, who was in the process of bringing the cocaine into Illinois. Presentence Report (PSR) 2-3.

Petitioner was charged with conspiring to distribute kilogram quantities of cocaine and attempting to possess cocaine with the intent to distribute it. The conspiracy count of the indictment alleged, *inter alia*, that petitioner and a co-defendant "picked up a shipment of 100 kilograms of cocaine," Indictment para. 5, and that the two men arranged for a car to be loaded with 46 kilograms of cocaine, *id.* para. 7. With respect to the attempted possession count, the indictment alleged that petitioner and another co-defendant "attempted to possess with intent to distribute approximately 46 kilograms of a mixture containing cocaine." *Id.* at 4.

At trial, petitioner did not seek an instruction requiring the jury to determine the quantity of drugs involved in petitioner's offenses, and the district court gave no such instruction. The jury found petitioner guilty of the offenses alleged in the indictment. C.A. App. A1.

The PSR determined that petitioner's base offense level under Sentencing Guidelines (Guidelines) § 2D1.1(c)(1) was 38, and it recommended upward adjustments for petitioner's supervisory role in the

offense and his possession of a firearm. PSR 5-6. The district court adopted the PSR's finding as to the quantity of drugs involved, enhanced petitioner's sentence by three levels for his role in the offense, but rejected the firearm enhancement. 06/24/99 Sent. Tr. 8. Petitioner had previously been convicted of a federal narcotics felony. PSR 7. Petitioner's Guidelines sentencing range was 360 months' to life imprisonment, and the district court sentenced him to concurrent terms of 372 months' imprisonment on each of the two counts of conviction. Judgment 2, 6; C.A. App. A79; see 06/24/99 Sent. Tr. 8, 10.

2. Petitioner filed an appeal in which he challenged several aspects of the pretrial and trial proceedings in his case. Petitioner did not challenge any aspect of his sentence. The court of appeals affirmed the judgment of the district court. Pet. App. 1-9.

ARGUMENT

1. Petitioner argues (Pet. 4-7) that his 372-month sentence was imposed in violation of this Court's decision in *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), because the district court rather than the jury determined the quantity of cocaine attributable to him. In *Apprendi*, the Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-2363.

Petitioner was convicted of one count each of conspiracy to distribute cocaine and attempted possession of cocaine with the intent to distribute it. He was subject to sentencing on those offenses in accordance with the graduated penalties set forth in 21 U.S.C. 841(b) (1994

& Supp. IV 1998), and the district court sentenced him to concurrent terms of 372 months' imprisonment on each count. A 372-month sentence is authorized by 21 U.S.C. 841(b)(1)(A) (1994 & Supp. IV 1998), which provides that a defendant with a prior felony drug conviction who has been found guilty of a drug offense involving five kilograms or more of cocaine "shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment." When a defendant with a prior felony drug conviction has been found guilty of a drug offense involving *any* quantity of cocaine, 21 U.S.C. 841(b)(1)(C) (1994 & Supp. IV 1998) authorizes "a term of imprisonment of not more than 30 years." Thus, petitioner's 372-month sentence on each of the two counts of conviction was above the statutory maximum authorized by Section 841(b)(1)(C), and it was premised on a fact (*i.e.*, that the offense involved five kilograms or more of cocaine) that the jury was not instructed to find beyond a reasonable doubt. Imposition of a sentence on each count of greater than 30 years' imprisonment, based on the district court's drug quantity determination, was error under this Court's decision in *Apprendi*.

2. Petitioner did not raise his claim in either court below.[1] The claim is therefore reviewable only for plain error. Fed. R. Crim. P. 52(b); see *Johnson* v. *United States*, 520 U.S. 461 (1997); *United States* v. *Meshack*, 225 F.3d 556, 575 (5th Cir. 2000), cert. denied, 121 S. Ct. 834 (2001); *United States* v. *Nordby*, 225 F.3d 1053, 1060

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[1] The court of appeals issued its decision more than three months after this Court's decision in *Apprendi*. Pet. App. 1. Petitioner does not contend that he brought the *Apprendi* decision to the attention of the court of appeals during that interval. See Fed. R. App. P. 28(j).

(9th Cir. 2000). The district court's error in imposing a 372-month sentence on each count based on drug quantity findings made by the court at sentencing was "plain," because the error was "clear" or "obvious" after the decision in *Apprendi*. See *Johnson*, 520 U.S. at 467-468 ("where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration"); *Nordby*, 225 F.3d at 1060.

Petitioner is not entitled to relief, however, unless he can also demonstrate that the error both "affect[ed] substantial rights" and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)). Petitioner cannot satisfy those requirements. On the facts of this case, petitioner could have no realistic possibility of obtaining any reduction in his overall sentence if the case were remanded for further proceedings in the court of appeals.

Even if petitioner had initially been sentenced to Section 841(b)(1)(C)'s 30-year maximum term of imprisonment on the conspiracy conviction, the district court would have had the statutory authority to impose a consecutive rather than concurrent sentence on the attempted possession count, see 18 U.S.C. 3584, and under Guidelines § 5G1.2 the court would have been required to proceed in that manner. "Rather than running the sentences concurrently, the Sentencing Guidelines would require that the sentence imposed on * * * the substantive count[] run consecutive to the sentence on the conspiracy count, to the extent necessary to produce a combined sentence equal to the total [Guidelines] punishment." *United States* v. *Page*, 232 F.3d 536, 544 (6th Cir. 2000) (citing Guidelines

§ 5G1.2(d)), petition for cert. pending, No. 00-7751 (filed Jan. 3, 2001) and cert. denied, No. 00-8491 (Mar. 19, 2001). Because petitioner would have been subject to the same 372-month term of imprisonment through the imposition of consecutive sentences on the conspiracy and attempted possession counts, the *Apprendi* error in this case could neither affect substantial rights nor seriously affect the fairness, integrity, or public reputation of judicial proceedings.[2] Petitioner therefore cannot satisfy the requirements for obtaining relief under Rule 52(b). See *Page*, 232 F.3d at 544-545; accord *United States* v. *Sturgis*, 238 F.3d 956, 960-961 (8th Cir. 2001); *United States* v. *White*, 238 F.3d 537, 543 (4th Cir. 2001).

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[2] As we explain above (see p. 4, *supra*), Section 841(b)(1)(C) authorizes a term of imprisonment of up to 30 years for a defendant who is convicted of an offense involving *any* quantity of cocaine and who has previously been convicted of a felony drug offense. *Apprendi* did not overrule this Court's decision in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), that Congress may constitutionally treat prior conviction of a crime—here a "felony drug offense"—as a sentencing factor to be found by the court. *Apprendi*, 120 S. Ct. at 2361-2363, 2366. In any event, even if petitioner's statutory maximum sentence on each of the two counts of conviction were 20 years' imprisonment—the maximum term authorized by Section 841(b)(1)(C) for defendants with no prior felony drug convictions—the district court would still have been authorized, consistent with all applicable statutory and Guidelines provisions, to sentence petitioner to 372 months' imprisonment by running the sentences on the two convictions consecutively in part.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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